SUPREME COURT, U. S.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

MARTIN DIES, JR., ET AL.,
Appellants

vs.

DAN PHILLIP CARTER, ET AL.,
Appellees

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

JURISDICTIONAL STATEMENT

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IN THE

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Appellants

vs.

DAN PHILLIP CARTER, ET AL.,

Appellees

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

JURISDICTIONAL STATEMENT

The Appellants appeal from that portion of the judgment of the United States District Court for the Northern District of Texas, Dallas Division, entered on the 21st day of December, 1970, declaring Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code to be unconstitutional and enjoining the State of Texas, through its political parties, from the enforcement of Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code. Appellants submit this Statement to show the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, San Antonio Division, rendered on the 18th day of December, 1970, which is not yet reported, is attached as Appendix "A". The order or judgment of the Court, entered on the 21st day of December, 1970, is attached at Appendix "B".

JURISDICTION

Appellees invoked the jurisdiction of the court below under the First and Fourteenth Amendments of the United States Constitution and 28 U.S.C. §§1343(3), 1343(4), 2201, 2202, and 42 U.S.C. §1983, seeking to have the Appellants enjoined from the enforcement of Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code. In addition, the Appellees sought to have the court below declare the aforesaid provisions of the Texas Election Code unconstitutional. The challenged provisions of the Texas Election Code are attached as Appendix "C". Suit was brought by the Appellees against Martin Dies, Jr., Secretary of State of the State of Texas, and Preston Smith, Governor of Texas. Also named by Appellees as Defendants were the Chairman of the State Democratic Executive Committee, the Chairman of the Tarrant County Democratic Executive Committee, the Chairman of the County Democratic Executive Committee of El Paso County, Texas. The instant proceeding initially commenced as three separate lawsuits which were consolidated by the court below.

The Governor of the State of Texas, Preston Smith, is the chief executive officer of the State of Texas and has the responsibility of executing the laws of the State

of Texas. Sections 1 and 10 of Article IV of the Constitution of Texas. The Secretary of State of the State of Texas, Martin Dies, Jr., is the chief election officer of the State of Texas. Article 1.03 of the Texas Election Code. The remaining Appellants are either county or statewide officials of the Democratic Party in Texas.

As Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code have statewide application and are not local in nature, and as the constitutionality of such statutes were challenged by the Appellees in the court below, a three-judge district court was convened to hear the case pursuant to 28 U.S.C. §2284, as required by 28 U.S.C. §2281.

The court below filed an opinion on the 18th day of December, 1970 (see Appendix "A"), holding Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code to be unconstitutional, and judgment decreeing such statutory provisions unconstitutional was entered on the 21st day of December, 1970 (see Appendix "B"). The judgment of the court below further decreed that the State of Texas, through its political parties, was enjoined from the enforcement of Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code.

Appellants' Notice of Appeal to this Court was filed in the United States District Court, Northern District of Texas, Dallas Division, on the 19th day of February, 1971, within the time prescribed by 28 U.S.C. §2101(b). Such Notice of Appeal is attached hereto as Appendix "D".

The jurisdiction of this Court to review the judgment of the court below is conferred by 28 U.S.C. §1253. *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d

947 (1968); *Zemel v. Rush*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *United States v. Georgia Pub. Serv. Comm.*, 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963); *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960).

QUESTION PRESENTED

Whether Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code are unconstitutional in that they violate the First and Fourteenth Amendments of the Constitution of the United States.

STATUTES INVOLVED

The Legislature of the State of Texas has heretofore enacted Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code. Such statutory provisions, which were challenged by the Appellees in the court below, are attached hereto as Appendix "C".

STATEMENT

The Appellees brought this action on behalf of themselves and the class of all other persons similiarly situated requesting that Appellants be enjoined and restrained from enforcing the provisions of Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code which require that candidates for party nomination to offices in the general election must pay filing fees as set out in the challenged sections of the Texas Election Code in order to have their names placed on the official ballot in the Democratic primary election. As a basis for such relief, the Appellees alleged

that the requirement for the payment of such filing fees violates the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and the freedom of assembly clause of the First Amendment of the United States Constitution. Some of the Appellees are candidates for election to certain local and statewide offices, who alleged that they could not afford to pay the filing fee required to have their name placed on the ballot in the Democratic Party primary election. The remaining Appellees are Intervenors who desire to vote for the Appellees who were candidates for public office.

The articles challenged require candidates to pay filing fees as a condition to having their names placed on a ballot in a primary election, and the Appellees have alleged that such filing fees deprive them of their right to run for office in violation of the due process and equal protection clauses of the Fourteenth Amendment because they cannot afford to pay the required fees. Specifically, the Appellees have alleged that the filing fee assessments are unreasonably high and without any reasonable relation to any legitimate legislative purpose.

The court below, in its opinion and judgment, has declared the challenged provisions of the Texas Election Code unconstitutional and has enjoined their enforcement by the Appellants. The basis for the conclusion reached by the court below would seem to be two-fold. First, the court below has concluded that the issue is actually one of what effect such filing fees have upon the voter and therefore have based their decision on the rights of the voter rather than upon the rights of candidates for public office. Secondly, while the court below has recognized that primary filing fees constitute

a permissible and legitimate interest of the State, and even under some instances may constitute a compelling interest, the court concluded that in the present case there was not a compelling State interest.

The contentions of the Appellants that the Appellees were attempting to have the court below extend certain voting right principles into the new area of candidates filing for office in primary elections; that the Appellees were attempting to have the court below follow guidelines or standards in passing upon the challenged statutes, which were more demanding than those required by prior decisions of this Court; and that there existed constitutionally sufficient reasons or even compelling reasons for the enactment of the challenged provisions of the Texas Election Code, were all cast aside by the court below.

THE QUESTIONS ARE SUBSTANTIAL

While the ultimate question for decision by this Court deals with the issue of whether Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code violate the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution and the First Amendment of the Constitution of the United States insofar as such provisions require a filing fee for a candidate's name to be placed on the ballot in a primary election, the Court is presented with several issues in arriving at its conclusion.

I. Should Voting Right Principles be Extended Into the Area of Filing Fees for Candidates In the Primary Elections of Political Parties.

While the instant proceeeding commenced as a challenge against certain statutes of the State of Texas

requiring candidates to pay a filing fee as a condition to having their names placed on a ballot in a primary election, the whole thrust of the case was altered by the statement made by the court below in its opinion which stated that:

> "Since the rights of the Intervenors as voters will be determinative of the constitutionality of the laws here attacked, we deem it unnecessary to discuss the rights of the candidates."

The court below then proceeded to treat the instant case as one dealing primarily as one involving an alleged restriction or burden upon the right of the voter to vote. The court below then proceeded to cite such cases as *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220 (1886); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). The court below then applied the principles of these cases to hold unconstitutional the challenged provisions of the Texas Election Code requiring candidates to pay filing fees as a condition to having their names placed on a ballot in a primary election. Consequently, the court has in effect extended certain principles laid down in voting right cases into a completely new and novel area for implementation.

The stringent requirements laid down by this Court in connection with cases dealing with circumstances where a voter had been denied the right to exercise this franchise would now be applied by the court below in passing upon the requirements which may be placed upon a candidate for public office as a condition to

having his name placed on the ballot in a primary election.

The Appellants submit that the court below was in error in making such an extension of these voting right principles to this new area, and in addition has ignored certain long established principles.

Examination of the various state voting systems reveals that there is no semblance of uniformity in the methods used in the various states for qualifying to get on the primary ballot. Just as the Fourteenth Amendment does not require uniformity among the states in the method adopted for the selection of electors for President and Vice-President, *McPherson v. Blacker*, 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869 (1892), neither does it require uniformity in the laws of the various states concerning procedures for being placed on primary ballots. Yet Appellees and the court below looked at the laws of other states in order to judge the validity of the Texas registration laws. They should not be judged by the measure of what other states (none of which are uniform) may choose to enact, but by what is permissible under the United States Constitution.

The Appellees have not shown that the filing fee statutes of this State, either upon their face or as administered, discriminate against any particular group or class of persons in Texas. Certainly there has been no denial of the right to vote.

The main thrust of the Appellees' argument is that the filing fee and assessment as provided by Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code are excessive and that such fees and assessments are discriminatory and in direct conflict with the equal protection clause of the Fourteenth amend-

ment of the United States Constitution. This question has long been laid to rest with respect to the constitutional right of a candidate to run for public office. In *Snowden v. Hughes*, 321 U.S. 1, 88 L.Ed. 497, this Court held that the right to become a candidate for state office is a right or privilege of state citizenship, not of national citizenship, which alone is protected by the privileges and immunities clause of the Fourteenth Amendment. This Court made the following observations, at page 502:

> "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. Slaughter-House Cases, 16 Wall. (US) 36, 74 79, 21 L ed 394, 408, 409; Maxwell v. Bugbee, 250 US 525, 538, 63 L ed 1124, 1130, 40 S Ct 2; Prudential Ins. Co. v. Check, 259 US 530, 539, 66 L ed 1044, 1052, 42 S Ct 516, 27 ALR 27; Madden v. Kentucky, 309 US 83, 90-93, 84 L ed 590, 594-596, 60 S Ct 406, 125 ALR 1383. The right to become a candidate for state office, like the right to vote for the election of state officers, Minor v. Happersett, 21 Wall. (US) 162, 170-178, 22 L ed 627, 629-631; Pope v. Williams, 193 US 621, 632, 48 L ed 817, 822, 24 S Ct 573; Breedlove v. Suttles, 302 US 277, 283, 82 L ed 252, 256, 58 S Ct 205, is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause."

The Appellees and the court below attempt to distinguish this case by stating that the complaint does not go to the privileges and immunities clause of the

Fourteenth Amendment, but rather goes to the equal protection clause and therefore *Snowden v. Hughes* is readily distinguishable. A careful reading of *Snowden v. Hughes*, however, clearly shows that this Court also dealt with the equal protection clause with respect to the constitutional right of a candidate to run for public office in one of the states of the union. In dealing with the equal protection clause, the Court goes on in *Snowden, supra*, to state the following:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. Taylor & Marshall v. Beckham, 178 US 548, 44 L ed 1187, 20 S Ct 890, 1009. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion. Cave v. Missouri, 246 US 650, 62 L ed 921, 38 S Ct 334, as we reaffirm it now."

The ruling in *Snowden, supra*, has been followed as late as 1967 in *Bynum v. Burns*, 379 F.2d 229 (Eighth Circuit, 1967) where the Court in dealing with an election case held that a Negro who was not certified as a candidate for Justice of the Peace because he had paid a one dollar statutory filing fee to the city treasurer instead of to the county treasurer, failed to establish jurisdiction allowing federal courts to require his certification in absence of a showing of discriminatory activity by state officials. In the *Bynum* case the Court, speaking through Judge Gibson, reaffirmed the holding in *Snowden, supra*, by the following observations, at page 231:

> "We note at the onset that this is an election matter pertaining solely to state office and would not ordinarily be covered by the Equal Protection

Clause, Due Process Clause or Privileges and Immunities Clause of §1, Fourteenth Amendment of the United States Constitution, unless the Court could, as alleged, find that Bynum was deprived of his right to run for local office because of his race. Admittedly Bynum did not follow the state procedure specified for qualifying as an independent candidate for the Justice of the Peace, position #3; nor did the Election Commissioners have any authority to waive any of the statutory requirements. All people of the state have an interest in the proper procedures being observed by state and local officials. There is nothing in the record to indicate that Bynum was treated differently than any other citizen would have been treated under the same or similar circumstances. There is no showing that other candidates who paid their statutory filing fee in the wrong place had their names placed on the ballot. The record discloses that the attorneys themselves were uncertain at the time of trial as to just where the $1 fee should be paid and it is certainly reasonable to hold with the District Court that persons seeking to qualify for office should abide by the statutory requirements, secure their own counsel in case of doubt, and not place the entire burden on elective officials who serve in part time capacities to clearly delineate legal requirements. Therefore, absent a showing of discriminatory activity by state officials, appellant has not established jurisdiction allowing the federal courts to act."

With respect to the Appellees' rights pertaining to state citizenship and as derived solely from their relationship with the State of Texas as established by state law, the Appellants submit that the Texas Legislature is empowered by the Constitution of the State of Texas to pass laws regulating elections under the provisions of Article VI, Section 4:

"In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters. As amended Nov. 8, 1966, effective Nov. 3, 1967."

In *Bodner v. Gray*, 129 So.2d 419 (1961), the issue raised by the Plaintiffs was considered by the Supreme Court of the State of Florida. In dealing with a question of the constitutionality of the requirement of the paying of a filing fee by a candidate for public office, the Florida Supreme Court made the following observations, at page 420:

"While there are authorities holding to the contrary, the great weight of authority supports the view that reasonable fees may be exacted from candidates for public office.

"This Court, although it has not directly passed upon this particular proposition, has consistently followed the majority view in related questions."

The case of *Bodner v. Gray, supra*, states that the great weight of authority supports the view that reasonable fees may be exacted from candidates for public office. Such cases as *Socialist Party v. Uhl*, 103 P. 181 (Calif. 1909); *Ritter v. Douglass*, 109 P. 444 (Nevada 1910); *State ex rel Riggle v. Brodigan*, 143 P. 238 (Nevada 1914); *State v. Nichols*, 50 Wash. 508, 97 P. 728; *Patton v. Withycombe*, 159 P. 78 (Ore. 1916); *Gray v. Kenny*, 153 P.2d 961 (Calif. 1945); *Kenneweg v. Allegany County Com'rs.*, 62 Atl. 249 (Md. 1905) certainly substantiate the long recognized rule by many of our states' highest courts that filing fees are both a

necessary and legitimate requirement of a candidate obtaining the placement of his name upon the ballot. These cases also demonstrate the many desirable, if not necessary, reasons for the requirement of such a filing fee. While the Appellants are aware that such precedent is neither controlling or binding upon this Court or the court below, the Appellants do submit that such long standing and well reasoned precedent should not be taken lightly or ignored.

The court below commented upon the recent decision in the case of *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), as supporting the conclusion reached as to the challenged provisions of the Texas Election Code. However, the Appellants submit that *Williams v. Rhodes, supra*, would hardly seem controlling in the instant case as it dealt with an attempt by a political party to be included on the ballot in the general election rather than a particular candidate paying filing fees to enter the primary. Also, *Williams v. Rhodes, supra*, recognized that the state could have a compelling interest in regulating the ballot. This Court stated in *Williams v. Rhodes, supra*, that:

> "And, as we have said, the state is left with broad powers to regulate voting, which may include laws relating to the qualification and functions of electors. But here the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination in violation of the Equal Protection Clause.
>
> ". . .
>
> "Finally Ohio claims that its highly restrictive provisions are justified because without them a large number of parties might qualify for the ballot, and the voters would then be confronted with

a choice so confusing that the popular will could be frustrated. But the experience of many States, including that of Ohio prior to 1948, demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required. *It is true that the existence of multitudinous fragmentary groups might justify some regulatory control* but in Ohio at the present time the danger seems to us no more than 'theoretically imaginable'." (Emphasis added.)

In *Williams v. Rhodes, supra,* the court recognized that the restrictions placed upon political parties being included in the general election ballot were almost impossible other than for the Democratic and Republican parties, and this would seem to be the main reason for the court's decision. The Appellants submit, however, that in the instant case there is no such restriction that has the actual effect of limiting the candidates in a primary election to only certain favored candidates.

The Appellants further submit that the recent cases of *Jenness v. Little,* 306 F.Supp. 925 (1969); *Wetherington v. Adams,* 309 F.Supp. 318 (1970); *Fowler v. Adams;* 315 F.Supp.——, 27 L.Ed.2d 23, clearly disclose the confusion which arises when the courts attempt to apply the principles laid down in the voter rights cases to filing fees assessed candidates for public office in party primary elections.

No two states in this United States have elected to control and regulate the conduct of elections and the functioning of political parties within the election process in the same manner. The legislatures of the various states have through many years of trial and error devised various systems which meet the needs and desires of the citizens of each particular state. For the courts

to now attempt to substitute their discretion and judgment for that of the many legislative bodies would seem indeed improper. As this Court said in *Communist Party v. Control Board*, 367 U.S. 1 (1961):

> "It is not for the courts to re-examine the validity of legislative findings and reject them."

The very nature of the judicial process makes it an inappropriate forum for the determination of the complex factual questions of the kind involved in the instant proceeding, and the Appellants submit that the courts should refrain from striking down legislative enactments in this area merely because the court feels that another method of handling the issue would have been preferable.

As this Court stated in *Griswold v. Connecticut*, 381 U.S. 479 (1965):

> ". . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."

The Appellants submit that the court below has fallen into error in its decision as it has failed to follow the warning of this Court set forth in *Griswold v. Connecticut, supra*. The court below has summarily stricken down numerous statutes of the Texas Election Code merely because they felt that it resulted in filing fees being too high for candidates in primary elections. The court below did recognize the validity of filing fees but left no guidelines to the Legislature as to what type of filing fees would be reasonable or approved by the court. In turn, the court below stripped the State of Texas of its method of financing primary elections with

the mere comment that the court felt that the State of Texas would find other adequate means of raising this needed revenue. In the recent case of *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court set standards and guidelines for the lower courts to follow in determining whether state regulations in the welfare administration field violate the Fourteenth Amendment. Because of the similarity of these cases, both dealing with immensely complex problems, procedures and opinions, it is well to note the statement of this Court that:

> "And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise, economic or social policy.
>
> ". . . The intractable economic, social, and even philosophical problems presented by the public welfare assistance programs are not the business of this Court.
>
> ". . . The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

While the foregoing comments deal with the area of welfare administration rather than voting rights, the principles involved would seem to be almost identical. The election process, and the working of the various political parties within such process, is an extremely complicated subject, like unto that of welfare administration. In each instance no two states have chosen to use exactly the same approach and actually in the area of welfare administration there should be more

similarity of effort between the states because of the vast amount of federal regulation in this area.

The appellants submit that the guidelines and cautions set forth by this Court in *Dandridge v. Williams*, *supra*, would be applicable with even greater reason in the instant proceeding.

The Appellants submit that the court below was in error in extending the principles of the voting rights case to the area of filing fee assessments upon candidates for public office in party primaries.

II. Has the Court Below Followed the Proper Standards or Guidelines in Passing Upon The Challenged Provisions of the Texas Election Code.

At the outset there must be a determination of the standard by which the validity of the statutes in question are to be judged. The Appellees in the court below contend that the statutes in question may only be sustained if justified by some compelling State interest. However, it was and is the contention of the Appellants that the provisions in question are subject to no more than careful examination and close scrutiny.

An analysis of the opinions of the Supreme Court of the United States dealing with voting rights reveal that it is only where the right to vote is wholly denied to a class of persons that the state must show a compelling necessity for the imposition of the qualification which denies the right to vote. *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

In each of these cases the qualifications established by the state wholly denied the right to vote to a specified class. However, in those instances where the challenged statute imposes no more than a restriction or impairment upon the right to vote, rather than an absolute denial of such right, the statute is subject to careful and exacting scrutiny. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *McDonald v. Board of Election Commission of Chicago*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In either instance the test to be applied is exacting, with the difference being only in the degree of rationality which the provision must bear to the achievement of the state interest. In the present case, the Appellees have not been denied the right to vote.

While the challenged provisions of the Texas Election Code do not deny the right to vote to the Appellees the court below has applied the standard that Article 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code must be held invalid unless justified by a compelling State or governmental interest, rather than the standard of subjecting the statutory provisions to careful and exacting scrutiny. The Appellants submit that this position by the court below is in conflict with the principles set forth by this Court in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed. 2d 675 (1965); *Kramer v. Union Free School District*,

395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), as neither the Appellees or their class has been denied their right to vote by the challenged provisions of the Texas Election Code.

The court below in its opinion made the following statements concerning the challenged statutory provisions requiring a candidate to pay filing fees as a condition to having his name placed on a ballot in a primary election:

> ". . . The collection of revenue is, of course, a permissible and legitimate interest, but under these circumstances not a compelling state interest. These assessments are not necessary to insure the collection of revenue. Approximately eighteen states do not require candidates to pay any filing fees to support the primary. The State of Texas has been able to find other adequate means of collecting revenue which do not restrict the right to vote. . . .
>
> ". . .
>
> "The Court does not mean to imply that there is no compelling interest, pursuant to which the State may require a primary filing fee. We have limited our decision here to say that a filing fee violates the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment when it is used as a revenue collecting device or when made an absolute qualification in order for a candidate to get his name on the ballot. Indeed, there may be other compelling interests which would justify some reasonable type of fee. . . ."

The court below in its opinion recognized that the assessment of a filing fee from a candidate in a pri-

mary election was a permissible and legitimate interest of the State, but the court struck the challenged provisions down because they felt that even such permissible and legitimate interests were not under the circumstances compelling State interests. Consequently, the result reached by the court below as to the validity of the challenged statutes would apparently have been different had the court not applied the "compelling State interest" test. In this connection, the recent decision by Judge Celebrezze in *Howe v. Brown*, 319 F.Supp. 862 (1970), offers a most excellent discussion of the "rational relation" test as compared with the "compelling State interest" test.

The Appellants submit that the reasoning in *Howe v. Brown, supra*, is correct, and that the court below has applied the incorrect test in passing upon the validity of the provisions of the Texas Election Code herein involved. The court below should not have used the "compelling State interest" test, and had the court used the "rational relation" test, the validity of the challenged statutes would have been upheld.

III. Does There Exist a Constitutionally Sufficient Reason or Even a Compelling Reason for the Enactment of the Challenged Provisions of the Texas Election Code.

As stated previously, the court below in its opinion stated that while the articles of the Texas Election Code requiring candidates to pay filing fees as a condition to having their names placed on a ballot in a primary election was a permissible and legitimate interest of the State, it was not under the circumstances a compelling State interest sufficient to uphold the validity of the challenged statutory provisions. The court below

further recognized that there may be other compelling interests which would justify some type of reasonable fee, and admitted that *Williams v. Rhodes, supra*, recognized that the state could have a compelling interest in regulating the ballot. The court did not, however, give much of a hint as to just what these compelling reasons might be to uphold the validity of a filing fee for a candidate in a primary election. Apparently those reasons set forth in the numerous opinions from various states upholding filing fees, as set forth in *Wetherington v. Adams, supra*, did not constitute sufficiently compelling state reasons to uphold the challenged provisions of the Texas Election Code. However, if such is the case, then it becomes increasingly difficult to discover just what would be the compelling state reason necessary to uphold any filing fee.

Like the State of Florida, as is set forth in *Wetherington v. Adams, supra*, the Texas election laws divide the election process into party nomination elections, the primaries, and a general election by nominated candidates for office. This is true of virtually all of the states. For the same reasons as set out by the court in *Wetherington v. Adams, supra*, the Texas Legislature has adopted reasonable rules and regulations providing for the assessment and payment of filing fees required of candidates which are not discriminatory in fact or in application. An even more valid reason for such filing fees is the fact that these fees help support the parties and are the only method provided for defraying the expenses of holding the party primaries and can only be used to pay for the necessary expenses of the first and second party primaries, and any moneys not required for those expenses are refunded to those candidates paying the filing fees. By providing that each

county executive committee make their estimate of expenses and levy their assessment accordingly, the Legislature has attempted to place at the grass roots of the election process a method that will be fair to the members of the party of each county which is a political subdivision closest to the people and the basic political subdivision most of the officers elected will serve. However, the court below felt that the purpose of defraying the costs of conducting the primary elections was not a sufficiently compelling State interest when compared to the burden it placed on the voters and their candidates.

The Appellants submit that the reasoning of the court below was erroneous for several reasons. First, if the assessment of a filing fee sufficient to cover the costs of the primary election is not sufficiently compelling State interest to justify such a filing fee, then how could the court below justify any form of filing fee which did not have for its purpose as meritorious a reason as financing the election process. Secondly, the court below feels that the requirement of a filing fee places an undue burden on the voters. The Appellants submit that to do away with the candidate's having to pay these filing fees, which pay for the primary elections, will actually place another burden upon the voter which is not presently there. If the costs of conducting the primary elections are removed from those candidates who are seeking political offices and which do so under the banners of a particular political party, then the alternative which the court below has forced upon the State of Texas is that they must be assumed by State and local governmental bodies. Today these governmental bodies are being increasingly faced with the almost unsurmountable problems of the rising de-

mands for the use of the tax dollar. The court below in its decision has added yet another burden to the staggering costs of State and local government—the costs of financing the primary elections of all political parties. Needless to say, the taxpayer will ultimately have this additional cost added to his already increasingly staggering burden. The court below has apparently treated the taxpayer and the voter as two separate and distinct bodies. This, however, is to create a fantasy, because each and every voter is also either directly or indirectly a taxpayer. Actually the decision of the court below has merely transferred the costs of primary elections from the candidates to the voters. The court below has based its decision essentially on the assumption that the present filing fee system in Texas as to primary elections places an undue burden on the voter. The Appellants submit that the decision of the court below, in now placing the costs of the primary elections upon the voter, places a far heavier burden on the voter than existed prior to the court's decision. In addition, the court's decision has virtually insured a large list of candidates in every primary election with additional run-off elections then becoming virtually certain with increased election costs. The court below has not lessened the burden upon the voter by its decision—it has merely increased the voter's already staggering tax burden. Perhaps it might be well at this time for this Court to also consider the rights of the taxpayers of this country as well as their duties to support the costs of our government.

The opinion of the court below gives some significance to the fact that in Texas in a primary election, there is not an alternative "write-in" provision which would allow a write-in candidate in a primary election.

While this is in fact true, the Appellants submit that it is somewhat misleading. There are several provisions of the Texas Election Code which provide means of voters to associate together to place their chosen candidate on the ballot. Article 13.54 of the Texas Election Code sets out provisions for nominating candidates for county and precinct offices by a party without a State organization by holding a county convention. Also Article 13.47 and Article 13.47a provide for political parties not required by law to hold primaries to make nominations by conventions. Article 13.50 sets out the procedure for a non-partisan or independent candidate to get his name printed on the general election ballot in the column for independent candidates. The Texas Election Code has also made provisions for write-in candidates in the general election as set out in Articles 6.05, Subdivisions 3 and 5, 6.05b, 6.06a, 7.14, Sections 16 and 16a, 7.15, Subdivision 11, Paragraph (c) (8), Subdivision 19, Paragraphs (a) and (c), Subdivision 20, Paragraph (k).

A full study of the Texas Election Code will clearly reveal that the Texas Legislature has provided in the Election Code for many different ways for a person to have his name placed on the general election ballot, and the party primary provisions calling for the payment of filing fees apply to all candidates who seek that method of having their name placed as a candidate on a general election ballot.

The Appellants submit that there does exist constitutionally sufficient reasons, even compelling reasons, for the enactment of the challenged provisions of the Texas Election Code by the State of Texas. Determining just what constitutes a sufficiently compelling State interest in a matter as complicated as the election

process is at best an extremely difficult decision. The courts have in this case been presented numerous reasons which are certainly permissible or legitimate grounds. To summarily hold that they are not quite "compelling" enough is to ignore the long standing precedent and efforts which have gone into forming the election process of this country. The chaos which can result in the election process in this State by invalidating the method of financing primary elections seems somewhat unjustified when based upon grounds as difficult to determine as to what constitutes "compelling State interest".

CONCLUSION

It is submitted that the questions presented by this appeal are substantial and of public importance to the voters, candidates for political office, and those individuals charged with the responsibility of conducting elections in the State of Texas and those states throughout the United States with similar statutory provisions, warranting plenary consideration by this Court.

Respectfully submitted,

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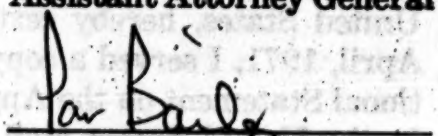

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CERTIFICATE OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14 day of April, 1971, I served a copy of the foregoing Jurisdictional Statement on the Appellees by depositing a copy in the United States mail, postage prepaid, and addressed to the attorneys of record for Appellees as follows: Mr. H. Averill Sweitzer, 5th Floor, Manor House, Dallas, Texas 75202; Mr. A. L. Crouch, 109 Taylor, Fort Worth, Texas 76102; Mr. John L. Fashing, 608 Southwest National Bank Building, El Paso, Texas 79901; Mr. Fred Weldon and Mr. Stuart R. Abelson, 119 N. Stanton Street, Room 215, El Paso, Texas 79901.

Pat Bailey

PAT BAILEY

APPENDIX

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-3635-C

3-Judge

VAN PHILLIP CARTER
versus
MARTIN DIES, JR. and
DR. ELMER C. BAUM

CA 3-3733-C

3-Judge

THEODORE H. WISCHKAEMPER
ON BEHALF OF HIMSELF AND ALL
OTHERS SIMILARLY SITUATED
versus
ROBERT L. WRIGHT, CHAIRMAN OF
THE TARRANT COUNTY DEMOCRATIC
EXECUTIVE COMMITTEE, et al.
REUBIN JENKINS, INTERVENOR

CA 3-3739

3-Judge

WILLIAM PATE, ON BEHALF OF HIMSELF
AND ALL OTHERS SIMILARLY SITUATED
versus
GEORGE A. McALMON, JR., AS CHAIRMAN OF
THE COUNTY DEMOCRATIC EXECUTIVE
COMMITTEE OF EL PASO COUNTY, TEXAS
AND INDIVIDUALLY AND THE COUNTY DEM-

OCRATIC EXECUTIVE COMMITTEE OF EL PASO COUNTY, TEXAS AND THE PRIMARY COMMITTEE

CARLOS GUZMAN, LUZ A. LOZANO, ANDREA L. SIFUENTES and MANUEL SAPIEN, on behalf of themselves and all others similarly situated, and as members of U.N.I.O.N., Incorporated,

INTERVENORS

ORDER

For the reason stated in the Opinions filed in the above styled cases, it is ORDERED, ADJUDGED and DECREED that Tex. Election Code Ann. Arts. 13.07a, 13.08, 13.08a, 13.15, and 13.16 (1967) are hereby declared to be unconstitutional because they infringe upon First Amendment rights without any compelling justification in violation of the First and Fourteenth Amendments and that the State of Texas, through its political parties, is enjoined from the enforcement of Tex. Election Code Ann. Arts. 13.07a, 13.08, 13.08a, 13.15, and 13.16 (1967).

SIGNED and ENTERED this 21st day of December, 1970.

HOMER THORNBERRY, Circuit Judge

SARAH T. HUGHES, District Judge

W. M. TAYLOR, JR., District Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-3635-C

3-Judge

VAN PHILLIP CARTER
versus
MARTIN DIES, JR. and
DR. ELMER C. BAUM

CA 3-3733-C

3-Judge

THEODORE H. WISCHKAEMPER
ON BEHALF OF HIMSELF AND ALL
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versus
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THE TARRANT COUNTY DEMOCRATIC
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CA 3-3739

3-Judge

WILLIAM PATE, ON BEHALF OF HIMSELF
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CARLOS GUZMAN, LUZ A. LOZANO, ANDREA L. SIFUENTES and MANUEL SAPIEN, on behalf of themselves and all others similarly situated, and as members of U.N.I.O.N., Incorporated,
INTERVENORS

Before THORNBERRY, Circuit Judge, and HUGHES and TAYLOR, District Judges

TAYLOR, District Judge

In the above cases, the plaintiffs seek an injunction to restrain the enforcement of Tex. Election Code Ann. Arts. 13.07a, 13.08, 13.08a, 13.15 and 13.16 (1967)[1] and to have them declared unconstitutional.

Art. 13.08 authorizes the county committee to make an assessment of the costs of running the primary and to apportion the cost in such a manner as in their judgment is just and equitable among the various candidates except for certain offices such as state senator and representative. "In making the assessment upon any candidate, the committee shall give due consideration to the importance, emolument, and term of office for which the nomination is to be made."

Art. 13.08a provides for a maximum allowable assessments that can be made by the committees in counties according to the population.

Arts. 13.15 and 13.16 regulate the filing fees for certain statewide offices.

These articles require candidates to pay filing fees

[1]Art. 13.07a provides that a candidate for a state office must pay a deposit of $50.00 to the county chairman at the time he applies for a place on the ballot.

as a condition to having their names placed on a ballot in a primary election.

The parties have stipulated that Plaintiff William Pate meets all qualifications to be a candidate in the Democratic Primary Elections for the office of County Commissioner of Precinct Four for El Paso County, Texas, except that he cannot pay the $50.00 deposit nor the $1424.00 assessment. Likewise, Plaintiff Theodore Wischkaemper meets all of the qualifications for County Judge of Tarrant County, Texas, except that he has not paid the $6,300.00 assessment fee.

Plaintiff Carter's application to be placed on the ballott for the office of Commissioner of the General Land Office was denied by the State Democratic Executive Committee because it was not notarized,[2] it was not accompanied by a filing fee,[3] and it was not accompanied by a notarized loyalty affidavit.[4]

In addition to the plaintiffs, Reuben Jenkins has been allowed to intervene as a voter who wished to vote for plaintiff Wischkaemper and Carlos Guzman, et al. have asked to be allowed to intervene as voters who desired to vote for Plaintiff Pate. The latter will be allowed to intervene. Fed. R. Civ. P. 24 (a) (2).

Plaintiffs claim that the filing fees deprive them of their right to run for office in violation of the due process and equal protection clauses of the Fourteenth Amendment because they cannot afford to pay the required fees. Intervenors claim that the filing fees deprive them of their right to vote for a candidate of their own choice in violation of the same sections of the Constitution. Specifically, it is alleged that the

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[2] Tex. Election Code Ann. Art. 13.12 (1967).
[3] Tex. Election Code Ann. Art. 13.08 (1967).
[4] Tex. Election Code Ann. Art. 6.02 (1967).

assessments are (1) exorbitant, arbitrary, capricious, irrelevant, unreasonable, outrageously high, (2) without any reasonable relation to any legitimate legislative purpose and not germane to one's ability to participate intelligently in the electoral process, and (3) discriminatory, in that some offices are assessed higher amounts than others.

A three-judge court was convened on April 3, 1970 in accordance with 28 U.S.C. § 2281 to hear the Plaintiffs' request for a prèliminary injunction. The court allowed the names of Plaintiffs Pate and Wischkaemper to be placed upon the ballot without the payment of any fee. No fee would have to ever be paid if, on final determination of the merits, their claims are accepted by the court; but, should the court reject their claims, they would then be required to pay the challenged fees. Relief was denied as to Plaintiff Carter because he has not complied with filing requirements unrelated to filing fees and assessments. Neither Pate nor Wischkaemper won in their respective primary.

All plaintiffs have stated that they intend to become candidates for state office at the next election period. Even though Plaintiff Carter has failed to meet other requirements in addition to not paying the filing fee, the court need not pass upon his claim because the relief he seeks is the same as that sought by Plaintiffs Pate and Wischkaemper.

It is undisputed that primary elections of political parties are state action and subject to the Fourteenth Amendment. *Smith v. Allwright,* 321 U.S. 649, 88 L. Ed. 987, 64 S.Ct. 757 (1944).

Since the rights of the intervenors as voters will be determinative of the constitutionality of the laws

here attacked, we deem it unnecessary to discuss the rights of the candidates.

The right to vote was defined as a "fundamental political right" in *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 30 L.Ed. 220 (1886). In more recent times the court has said,

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds v. Sims,* 377 U.S. 533, 561-62, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964).

The *Reynolds* court went further in describing the right to vote, saying it included the right to cast one's vote effectively.[*] The effectiveness of the vote there was quantitative in that it was an apportionment case. In *Williams v. Rhodes,* 393 U.S. 23, 30 21 L.Ed.2d 24, 89 S.Ct. 5 (1968), the right to cast one's vote effectively was again discussed. The effectiveness of the vote in that case was qualitative in nature rather than quantitative in that the voters were desirous of voting for a specific candidate who espoused their political beliefs.

The right to choose one's candidate is not only a fundamental political right protected by the Fourteenth Amendment, it encompasses the First Amendment right "to associate for the advancement of political beliefs." *Williams v. Rhodes,* supra.

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[*] "'Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature, modern and viable state government needs, and the constitution demands, no less." 377 U.S. at 565.

Whenever a First Amendment right is encumbered by the state, the burden is on the state to show that such infringement is necessary to support a compelling state interest.* The primary purpose of the filing fee assessments under the Texas statutory scheme is to raise revenue. *Campbell v. Davenport,* 362 F.2d 624, (5th Cir. 1966). This "tax" is used by the party to cover the cost of the primary. All monies collected in excess of the cost of the primary are refunded to the candidate.

In order to qualify as a compelling state interest, the law must be shown to be "necessary and not merely rationally related to the accomplishment of a permissible state policy." *McLaughlin v. Florida,* 379 U.S. 184, 196, 13 L.Ed. 2d 222, 85 S.Ct. 283 (1964). The collection of revenue is, of course, a permissible and legitimate interest but under these circumstances not a compelling state interest. These assessments are not necessary to insure the collection of revenue. Approxi-

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*"The presumption of constitutionality and the approval of 'rational' classifications in other types of enactments are based on an assumption that the the institutions of state government are structured so as to fairly represent all people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." *Kramer v. Union School District,* 395 U.S. 621, 628 (1969).

"[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the state has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms.

"The state has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate." *Williams v. Rhodes,* 393 U.S., at 31. See "The Supreme Court, 1968 Term," 83 Harv. L. Rev. 60, 93, n. 30 (1969).

mately eighteen states do not require candidates to pay any filing fees to support the primary.[7] The State of Texas has been able to find other adequate means of collecting revenue which do not restrict the right to vote.[8] *United States v. State of Texas,* 252 F.Supp. 234, 252 (W.D.Tex. 1966).

By requiring this "tax" in the form of primary filing fees, the State of Texas has in effect imposed a wealth requirement directly upon the candidate and the voters they seek to represent. A standard of wealth has never been considered as relevant to one's intelligent participation in the electoral process. As the Supreme Court said in *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 668, 16 L.Ed. 2d 169, 86 S. Ct. 1079 (1966).

> We conclude that a state violates the Equal Protection clause of the Fourteenth Amendment whenever it makes the affluence of the voter or the payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying this or any other tax. . . .
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> * * * *
>
> But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed,

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[7] Colorado, Indiana, Iowa, Illinois, Kansas, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee and Vermont.

[8] The Secretary of State has already presented to the House Interim Committee on Elections proposed election law changes. It recognizes the exorbitant filing fees assessed in some counties and the unworkability of the present system in the future. It recommends that the primary expenses be borne not only by the candidate, but also by the county and state. *Office of the Secretary of State, Proposed Election Law Changes, A report to the 62nd Legislature of the State of Texas,* December 10, 1970.

or color, is not germane to one's ability to participate intelligently in the electoral process.

The Court does not mean to imply that there is no compelling interest, pursuant to which the State may require a primary filing fee. We have limited our decision here to say that a filing fee violates the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment when it is used as a revenue collecting device or when made an absolute qualification in order for a candidate to get his name on the ballot. Indeed, there may be other compelling interests which would justify some type of reasonable fee. The *Williams* court recognized that the State could have a compelling interest in regulating the ballot.[9]

In determining whether the State's interest in exacting a filing fee is sufficiently compelling, "we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams v. Rhodes,* supra, p. 30. Here the high fee charged, in the thousands of dollars, for revenue purposes is not sufficient state interest when compared to the burden it places on the voters and their candidates. A "write-in" alternative would not bring about the needed balance on the "individual-state interest" scale and make these fees any more

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[9] *Wetherington v. Adams,* 309 F.Supp. 318 (N.D.Fla., 1970) recognized this interest as a justification for a primary filing fee.

Jenness v. Little, 306 F.Supp. 925 (N.D.Ga., 1969) *appeal dismissed* 397 U.S. 94 (1970), also recognized this as a legitimate and possibly compelling state interest. However, the court there said that it could not be an absolute qualification. If used for this purpose, there should be some alternative provided. A pauper's affidavit and a supporting nominating petition could protect this interest and serve as an alternative to a filing fee.

palatable. *Williams v. Rhodes, supra,* and *Jenness v. Little, supra.*

The Court is aware of the fact that in *Wetherington v. Adams, supra,* filing fees for a primary election were upheld as constitutional. The plaintiff in that case was a candidate and the issues were decided on the basis of what were his rights vis-a-vis those of the state. While neither approving nor disapproving of the reasoning used or the results reached, we need only say that in the case at bar we have resolved the issues on the rights of the voters. The cases are, therefore, distinguishable.

In granting declaratory relief, we hold that the statutes are unconstitutional because they infringe upon the exercise of voting and associational rights without any compelling justification in violation of the First and Fourteenth Amendments. The State of Texas, through its political parties, will be enjoined from the enforcement of the Texas Election Code sections requiring filing fees and assessments of a candidate in order that his or her name be placed upon a primary ballot.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-3635-C

3-Judge

VAN PHILLIP CARTER

versus

MARTIN DIES, JR. and
DR. ELMER C. BAUM

CA 3-3733-C

3-Judge

THEODORE H. WISCHKAEMPER
ON BEHALF OF HIMSELF AND ALL
OTHERS SIMILARLY SITUATED

versus

ROBERT L. WRIGHT, CHAIRMAN OF
THE TARRANT COUNTY DEMOCRATIC
EXECUTIVE COMMITTEE, et al.
REUBIN JENKINS, INTERVENOR

CA 3-3739

3-Judge

WILLIAM PATE, ON BEHALF OF HIMSELF
AND ALL OTHERS SIMILARLY SITUATED

versus

GEORGE A. McALMON, JR., CHAIRMAN OF
THE EL PASO COUNTY DEMOCRATIC
EXECUTIVE COMMITTEE, ET AL.

CARLOS GUZMAN, LUZ A. LOZANO, ANDREA
L. SIFUENTES and MANUEL SAPIEN,
INTERVENORS

Before THORNBERRY, Circuit Judge, HUGHES, and TAYLOR, District Judges.

THORNBERRY, CONCURRING SPECIALLY:

At issue in the instant case is whether the State of Texas through the imposition of primary filing fees has unduly impinged upon the right of its citizens to associate for the advancement of political beliefs and the right of its qualified voters to vote and to cast their votes effectively. Because I am of the belief that it has, I concur in the result of this judgment.

The standard by which the constitutionality of these controverted election code provisions is to be measured is, as the majority points out, the *Williams* test:[1] Bearing in mind that only a compelling state interest can justify a state's limiting First Amendment freedoms, the Court must consider the facts and circumstances behind the law, the interests that the state claims to be protecting, and the interests of those who are disadvantaged by the classification. Accordingly, I examine, first, the interests of those disadvantaged by the provisions, and, secondly, the interests of the State.

At the very core of this dispute lies the First Amend-

[1]Defendants, relying primarily on *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944), contend that this Court should not set aside the election code provisions unless they are grounded in a rationale wholly irrelevant to the achievement of a legitimate state interest, or unless they incorporate an element of intentional or purposeful discrimination. It is true that *Snowden* stated that "an element of intentional or purposeful discrimination" needs to be shown to demonstrate a denial of equal protection. *Snowden*, however, has been modified pro tanto by the language of *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), and by the rationale of *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), wherein the Supreme Court found a denial of equal protection without an "invidious or purposeful discrimination."

ment's guarantee of the right to engage in association for the advancement of beliefs and ideas[5] and the "fundamental political right" that constitutes the essence of a democratic society and is "preservative of all rights"—the right to vote.[6] In the State of Texas there is simply no way that a person can obtain the Democratic Party nomination other than by paying the filing fee and being elected. The election code includes no provision for nominating petitions at the party level. Moreover, under article 13.09[7] write-in voters may not be counted in primary elections, and no space on the ballot is provided for them. Consequently, voters are deprived of the opportunity to have their candidate considered for the Democratic Party nomination if he cannot post the filing fee.

Since in the overwhelming majority of Texas political offices nomination by the Democratic Party is tantamount to election, it is clear that restriction on entry into the primary may signficantly impair the right to cast one's vote effectively. In addition, the right of association is abridged significantly in that a person unable to pay the filing fee must, with the aid of those desirous of supporting him, form a new party or run as an independent: They are precluded by the high filing fee from associating within the established party. Undeniably, then, the State's high primary filing fees impose significant burdens on the right to vote and to

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[5] The Supreme Court has repeatedly held that freedom of association is protected by the First Amendment. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); *United Mine Workers of America, Dist. 12 v. Illinois State Bar Assn.*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1966); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

[6] *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886).

[7] Tex. Election Code Ann. Art. 13.09 (1967).

associate. The question determinative of this controversy is whether there lies behind the high fees a State interest sufficiently compelling to justify the burdens.

Three State policies allegedly are furthered by this fee system. First, the State contends that the fees serve to limit candidacy to "serious" candidates. To discriminate against voters or candidates on the basis of the depth of their pocketbooks, however, is to wade into unconstitutional waters. *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Cipriano v. City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Turner v. Fouche,* 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970). It is no answer to proclaim that those candidates without substantial financial backing cannot seriously hope to win. The seriousness and legitimacy of a political effort is not to be measured by the bullion with which it is bulwarked. Though modern politics may dictate that low budgets do not win elections, it cannot be doubted that those with low budgets are entitled to try. *Thomas v. Mims,* — F.Supp. — (S.D. Ala. C.A. No. 5702-69, 1970). Clearly, this first alleged justification is without sufficient merit to warrant the imposition of these burdens.

Secondly, Texas seeks to ground these high fees in the State interest of regulating the ballot to prevent confusion of voters. Although courts have indeed approved the objective of regulating the ballot,[8] the approval has been bestowed within the context of nominal or reasonable fees.[9] Defendants have pointed to

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[8] *See, e.g., Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); *Wetherington v. Adams,* 309 F.Supp. 318 (N.D.Fla. 1970); *Jenness v. Little,* 306 F.Supp. 925 (N.D.Ga. 1969), appeal dismissed 397 U.S. 94 (1970).

[9] *See, e.g., Bynum v. Burns,* 8th Cir. 1967, 379 F.2d 229;

no instance in which fees of the magnitude here challenged—up to $8,900—have received judicial sanction. The fact that virtually all states assess filing fees smaller by a factor of ten or more than those of Texas, and some states none at all, quite strongly indicates that other states have not found the imposition of exorbitant filing fees a *sine qua non* of regulating the ballot.[1] I do not deny that Texas may have a compelling interest in regulating its ballot, but I am of the opinion that the interest can justify, at the very most, only reasonable fees; it cannot impart validity to the amounts here challenged.

Texas also asserts that the filing fee scheme pays for the primary and thus not only avoids draining the State treasury but also allows Parties to remain entities independent of the State. The justification of keeping the Parties private and unsubjected to State interests is, under the circumstances of this case, not a strong one. The Party's role in conducting the primary is, after all, purely ministerial and quite extensively regulated by the State. Nor, in light of the interests at stake, would the burden on the State treasury be onerous if Texas were to assume a substantial portion of the primary expenses. Indeed, as the majority points out, eighteen states require of candidates no filing fee to support the primary. Furthermore, although filing fees have been judicially sanctioned on grounds of contribution, defendants have

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Kenneweg v. Allegany County Com'rs, 62 Atl. 249 (Md. 1905); *Socialist Party v. Uhl*, 103 P. 181 (Cal. 1909); *State ex rel. Riggle v. Brodigan*, 143 P. 238 (Nev. 1914); *Bodner v. Gray*, 129 So.2d 419 (Fla. 1966); *State v. Nichols*, 97 P. 728 (Wash. 19—); *Wetherington v. Adams*, 309 F.Supp. 319 (1970).

[1] See Office of the Secretary of State, Proposed Election Law Changes, A Report to the 62nd Legislature of the State of Texas, December 10, 1970 at —.

pointed to no cases other than Texas cases that place the entire burden of primary expense upon the candidates. If Texas has a compelling interest in requiring primary fees for revenue purposes, the interest can justify no more than requiring a candidate to contribute a reasonable portion of the primary expenses attributable to his candidacy. The fees here challenged clearly do not fall within that ambit and must be invalidated.

I do not here undertake the task of determining what constitutes a reasonable fee. I would emphasize, however, that two of our most precious freedoms are at stake, and thus the dimensions of reasonableness within which the State may safely impose a fee are indeed low and narrow.*

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*This is especially true where, as in the instant case, the State has provided no alternative, such as a petition, to the filing fee.

APPENDIX "C"

Art. 13.07a Deposit to accompany application for place on ballot

(1) Every candidate for public office who is subject to assessment by the county executive committee for a portion of the expenses of holding the primary election, except candidates for the Legislature and for the State Board of Education, shall pay to the county chairman, at the time of filing his application for a place on the ballot, a deposit of fifty dollars. In case of district offices in districts containing more than one county or part thereof, the candidate shall pay a deposit of fifty dollars to each county chairman with whom his application is filed. A candidate for the Legislature shall pay to the county chairman, at the time of filing his application, a deposit in the amount of the maximum which he may be assessed in that county, or the amount of the filing fee in that county in cases where a fixed fee is prescribed. A candidate for the State Board of Education shall pay to each county chairman, at the time of filing his application, the quotient obtained upon dividing fifty dollars by the number of counties in the district in which he is a candidate. The fees and deposits accompanying the applications shall become a part of the primary fund.

(2) After the county executive committee makes the assessments provided for in Section 186 of this code,[1] it shall refund to each candidate within thirty days thereafter the amount of the payment in excess of the assessment against the candidate if the deposit exceeds the assessment. If the deposit does not exceed the assessment, the balance due on the assessment shall be paid as provided in Section 186.[1]

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[1]Article 13.08.

Amended by Acts 1967, 60th Leg., p. 1909, ch. 723, § 41, eff. Aug. 28, 1967.

Art. 13.08 Expenses of primary

(1) Prior to the assessment of the candidates, the county committee shall carefully estimate the cost of printing the official ballots, renting polling places where same may be found necessary, providing and distributing all necessary poll books, blank stationery and voting booths required, compensation of election officers and clerks, and all other necessary expenses of holding the general primary and second primary in such county and on the second Monday in February preceding each primary, shall apportion such cost in such manner as in their judgment is just and equitable among the various candidates for nomination for district, county, and precinct offices only as herein defined, except the offices of Justice of the Court of Civil Appeals and member of the State Board of Education, and except the office of state senator and state representative if the assessment or fee payable to the county chairman is fixed at a definite amount, but taking into account the assessments and filing fees received from candidates for the Legislature and the State Board of Education. Where a district office covers more than one county, the assessment of such candidate by the county shall be not more than a sum which is the quotient of the amount which he would be assessed if he represented only one county determined by the formula used to assess county candidates, when divided by the number of counties in his district. In making the assessment upon any candidate the committee shall give due consideration to the importance, emolument, and term of office for which the nomination is to be made. Within 24 hours after adjournment of the meeting, the chairman shall mail to each person

against whom an assessment is made a notice stating the amount of such expenses apportioned to him and informing him that the difference between the amount of the assessment and the amount of the deposit which accompanied the candidate's application must be paid to the chairman on or before the fourth Monday in February; and no person's name shall be placed on the ballot unless he pays the assessment within the prescribed time. The notices shall be sent to the candidates by registered or certified mail, and the chairman shall obtain a receipt for each letter, postmarked by the post office at which the letter is mailed, as evidence of the mailing, and shall preserve the receipts for a period of three months.

(2) A candidate filing after the date of the aforesaid meeting shall not be required to accompany his application with the deposit provided for in Section 185a of this code,[1] but shall pay the full amount assessed against him by the county executive committee within one week from the date on which his application is filed; provided, however, that where a fixed filing fee is required for an office included in this section, the amount of the fee must accompany the application.

(3) It shall be sufficient to meet the requirements of this law to mail by registered or certified letter to the chairman before the deadline herein provided, as shown by the postmark on the letter, a money order, a certified check, or a cashier's check; but it shall not be sufficient to make the payment by any other type of mail unless it is delivered before the deadline.

(4) A candidate for the State Board of Education shall pay a filing fee of fifty dollars, which shall be prorated equally among the counties comprising the

[1] Article 13.07a.

district in which he is a candidate, and the prorated amount shall be paid to each county chairman at the time the candidate files his application for a place on the ballot.

Amended by Acts 1967, 60th Leg., p. 1910, ch. 723, § 42, eff. Aug. 28, 1967.

Art. 1308a Assessment of candidates in counties having certain populations

Candidates for any precinct, county or district office and the office of Congress in counties which have a population of one million (1,000,000) or more, according to the last preceding Federal Census, except candidates for the State Legislature and State Board of Education, shall not be assessed a sum in excess of ten percent (10%) of the aggregate annual salary provided for any office of two-year terms, and fifteen percent (15%) of the aggregate annual salary provided for any office of four-year terms, to have their names placed on the ballot in any primary election. Candidates for the State Board of Education shall not be assessed a sum in excess of the amount stated in Section 186 of this Code.[1]

Notwithstanding other provisions of law, the county executive committee in any county which has a population of one million (1,000,000) or more, according to the last preceding Federal Census, may require candidates for State Representative to pay an amount not exceeding Five Hundred Dollars ($500) to have their names placed upon the ballot in a primary election. A candidate for nomination for State Senator shall pay the full amount of One Thousand Dollars ($1,000) as filing fee for office of State Senator to have his name

[1] Article 13.08.

placed upon the ballot in a primary election at the time he files his application for a place on the ballot. The payment must accompany the application and must be in the form of cash, money order, cashier's check or certified check. The application and payment must be delivered to the proper party chairman or secretary by the deadline for making application for a place on the ballot, and it shall not be sufficient for the application and payment to have been mailed before the deadline unless they are actually delivered by the deadline. After the county executive committee makes the assessments as provided in Section 186 of this Code, it shall refund to each candidate within thirty (30) days thereafter the amount of the payment in excess of the assessment against the candidate.

Notwithstanding other provisions of law, the county executive committee in any county which has a population of nine hundred thousand (900,000) to one million (1,000,000), according to the last preceding Federal Census, shall require candidates for State Senator or State Representative to pay the amount of Three Hundred Dollars ($300) to have their names placed upon the ballot in a primary election.

Notwithstanding other provisions of law, the county executive committee in any county which has a population of six hundred fifty thousand (650,000) to nine hundred thousand (900,000), according to the last preceding Federal Census, shall require candidates for State Senator to pay the amount of One Thousand Dollars ($1,000) and candidates for State Representative to pay the amount of Six Hundred Dollars ($600) respectively to have their names placed upon the ballot in a primary election; however, if part of such a county is joined to two (2) or more other counties to comprise a senatorial district, the county executive com-

mittee shall require candidates for State Senator of that senatorial district to pay the amount of Two Hundred Fifty Dollars ($250) to have their names placed upon the ballot in a primary election; and such payment must accompany the application and must be in the form of cash, money order, cashier's check, or certified check and which shall in no event be refunded in whole or in part except in case of the death of the applicant before the primary election. Any person making a refund or participating in making a refund in violation of the provisions of this paragraph is guilty of a misdemeanor and upon conviction is punishable by imprisonment in the county jail for not more than ninety (90) days or by a fine of not more than Five Hundred Dollars ($500) or by both.

In any State Representative District consisting of eight (8) and not more than nine (9) counties, the chairmen of the county executive committees shall require candidates for State Representative to pay an amount of Twenty-five Dollars ($25) for each of the counties in said Representative District, to have their names placed upon the ballot in a primary election.

Amended by Acts 1969, 61st Leg., p. 2275, ch. 766, § 1, eff. Sept. 1, 1969.

Art. 13.15. Filing fees for certain offices

Candidates for United States Senator and all those who are candidates for state offices to be voted upon by the qualified voters of the whole state shall pay to the chairman of the state executive committee $1,000. Candidates for Congressman-at-large or for justice of the court of civil appeals shall pay to the chairman of the state executive committee five percent of one year's salary. A candidate who is required to pay a filing fee as herein provided shall not be required to pay any

other sum to any other person or committee to have his name placed on the ballot as such candidate. Payment of the fee herein required must be made at the time the candidate files his application for a place on the ballot, and the name of no person who is required to pay a filing fee in any place or to the chairman of the state executive committee shall be placed on the ballot unless he has paid the fee in accordance with these provisions.

Amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 31, eff. Sept. 1, 1969.

Art. 13.16. Payments by candidates for state senator or representative

Subdivision 1. Except as otherwise provided in this code, no candidate for nomination for state senator shall be required to pay to the county executive committee to have his name placed on the primary ballot more than the following amounts:

1. One dollar per county for counties having a population of less than 5,000.

2. Five dollars per county for counties having a population of 5,000 and not more than 10,000.

3. Ten dollars per county for counties having a population of more than 10,000 and less than 40,000.

4. Fifty dollars per county for counties having a population of 40,000 and not more than 125,000.

5. Seventy-five dollars per county for counties having a population of more than 125,000 and not more than 200,000.

6. One hundred dollars per county for counties having a population of more than 200,000.

7. One hundred dollars per county for all senatorial districts composed of no more and no less than two counties, regardless of the population of such counties.

The population in each case is to be determined by the last preceding federal census.

Subdivision 2. Except as otherwise provided in this code, each candidate for nomination for state representative shall pay a filing fee of $150. In districts containing all or part of more than one county, the filing fee shall be prorated among the counties comprising the district on the basis of the percentage of the population of the district residing in each county, as determined by the last preceding federal census. The chairman of the state executive committee of each political party which is holding a primary election shall compute the prorations and shall forward to the chairman of each county executive committee of that party the pertinent information for his county not later than the first day of December preceding the election year.

Subdivision 3. Where some other section of this code provides for an assessment or filing fee at variance with this section, the special provision of the other section shall control.

Amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 32, eff. Sept. 1, 1969.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C.A. 3-3635-C

3-Judge

VAN PHILLIP CARTER

v.

MARTIN DIES, JR. AND
DR. ELMER C. BAUM

C.A. 3-3733-C

3-Judge

THEODORE H. WISCHKAEMPER,
ON BEHALF OF HIMSELF AND ALL
OTHERS SIMILARLY SITUATED

v.

ROBERT L. WRIGHT, CHAIRMAN OF
THE TARRANT COUNTY DEMOCRATIC
EXECUTIVE COMMITTEE, ET AL.
REUBIN JENKINS, INTERVENOR

C.A. 3-3739

3-Judge

WILLIAM PATE, ON BEHALF OF HIMSELF
AND ALL OTHERS SIMILARLY SITUATED

v.

GEORGE A. McALMON, JR., AS CHAIRMAN
OF THE COUNTY DEMOCRATIC EXECUTIVE
COMMITTEE OF EL PASO COUNTY, TEXAS,
AND INDIVIDUALLY AND THE COUNTY
DEMOCRATIC EXECUTIVE COMMITTEE

OF EL PASO COUNTY, TEXAS, AND
THE PRIMARY COMMITTEE

CARLOS GUZMAN, LUZ A. LOZANO, ANDREA L. SIFUENTES AND MANUEL SAPIEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, AND AS MEMBERS OF U.N.I.O.N., INCORPORATED, INTERVENORS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that Martin Dies, Jr., Secretary of State of the State of Texas, Dr. Elmer C. Baum, Chairman of the State Democratice Executive Committee, Dr. J. D. Tomme, Jr., Chairman of the Tarrant County Democratic Executive Committee, George A. McAlmon, Jr., Chairman of the County Democratic Executive Committee of El Paso County, Texas, the County Democratic Executive Committee of El Paso County, Texas, and the Primary Committee, the Defendants in the above styled and numbered cause, hereby appeal to the Supreme Court of the United States from the following portion of the judgment entered in this action on the 21st day of December, 1970:

> "For the reasons stated in the Opinions filed in the above styled cases, it is ORDERED, ADJUDGED and DECREED that Tex. Election Code Ann. Arts. 13.07a, 13.08, 13.08a, 13.15, and 13.16 (1967) are hereby declared to be unconstitutional because they infringe upon First Amendment rights without any compelling justification in violation of the First and Fourteenth Amendments and that the State of Texas, through its political parties, is enjoined from the enforcement

of Tex. Election Code Ann. Arts. 13.07a, 13.08, 13.08a, 13.15, and 13.16 (1967)."

II.

This appeal is taken pursuant to 28 U.S.C. §1253.

III.

The Clerk will please prepare and certify a transcript of the entire record in this cause for transmission to the Clerk of the Supreme Court of the United States in accordance with Rule 12 of the Rules of the United States Supreme Court.

IV.

The following question is presented by this appeal: Whether Articles 13.07a, 13.08, 13.08a, 13.15 and 13.16 of the Texas Election Code are unconstitutional in that they violate the First and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

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Attorneys for Defendants

PROOF OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of February, 1971, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto as follows: on all of the Plaintiffs and Intervenors herein by mailing copies in duly addressed envelopes with First Class Postage Prepaid to their respective attorneys of record: Mr. H. Averill Sweitzer, Fifth Floor, Manor House, Dallas, Texas 75202; Mr. A. L. Crouch, 109 Taylor, Fort Worth, Texas 76102; Mr. John L. Fashing, 608 Southwest National Bank Building, El Paso, Texas 79901; Mr. Fred Weldon and Mr. Stuart R. Abelson, 119 N. Stanton Street, Room 215, El Paso, Texas 79901.

PAT BAILEY